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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 344.

BARBARA F. EVANS,
PERSONAL REPRESENTATIVE OF THE ESTATE OF ROY EVANS,
Petitioner,

vs.

GENERAL MOTORS CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

QUESTION PRESENTED.

The sole question presented by this diversity action is whether the court below correctly held under Indiana law that an automobile manufacturer may not be held responsible for injuries and deaths to users in collisions which its automobiles in no way *cause,* but merely *fail to prevent.*

STATEMENT.

Plaintiff's husband was killed in a typical intersection automobile collision when his 1961 Chevrolet Stationwagon was struck in the left side by another automobile.[1]

This diversity action against the manufacturer of decedent's stationwagon does not concern the admitted, well accepted principle that an automobile manufacturer owes a duty to users of its products to design and manufacture its products reasonably fit for their intended use free from latent defects. Respondent admits it has such a duty. Rather, petitioner has urged that the defendant as such manufacturer has an additional duty under Indiana law to protect users of its products from injury or death when struck by other automobiles, trains, tornadoes or any type of other forces or objects. The District Court and the Court of Appeals below held that no such duty exists under Indiana law.

The amended complaint in three counts charges defendant manufacturer with negligence in design and in failing to test design, with breach of implied warranty of fitness, and with strict liability in tort for placing in the stream of commerce an automobile in a dangerous and defective condition.

Each paragraph of complaint is based upon the same alleged defect in the stationwagon—its frame. It is alleged that General Motors knew that its automobiles are sometimes struck in the side by other vehicles; that the 1961 Model Chevrolet was dangerously defective to drivers when struck in the side because it had been designed with

1. The speed of the striking vehicle is not alleged in the complaint. However in plaintiff's complaint in state court against the driver of that vehicle she alleged that "he was then and there driving at a high and dangerous rate of speed of seventy (70) to seventy-five (75) miles per hour." (Appendix to Def. Br. below, p. 18.)

an "X" type frame without frame side rails instead of with a perimeter frame such as used by defendant in Oldsmobiles and by Ford in Fords and Mercuries; that when the stationwagon driven by plaintiff's husband was so struck, its "X" frame *permitted* its body to collapse against decedent's body, thereby *proximately causing* his death; that if the 1961 Model Chevrolet had been designed with a perimeter frame, plaintiff's husband would have had *added* (not necessarily *adequate*) protection in the side impact collision in which he was involved; and that General Motors knew of the alleged defect in the 1961 Model Chevrolet or at least could have discovered it by testing the "X" frame of such automobile from the standpoint of side impact collisions. (Appendix to Pl. Brief below, pp. 3-12.)

After pretrial conferences, oral argument, and submission of briefs, the District Court dismissed the amended complaint on the ground that each count failed to state a claim against defendant upon which relief could be granted. (Appendix to Pl. Br. below, pp. 1-3.) The majority of the court below affirmed, with Judge Kiley dissenting. (Petition, Appendix A, pp. 35-45.)

SUMMARY OF ARGUMENT.

Plaintiff's amended complaint against the manufacturer of an automobile which her husband was driving when he was killed in an intersection collision presents a claim which is not recognized under the products liability common law of Indiana, or for that matter, under the law of any other state.

The claim is *not* that defendant set in motion any force which *itself injured or killed* plaintiff's husband, or which *caused* or *contributed in any way* to the collision which killed him.

The only claim asserted is that the design of the frame

of such automobile was such that it failed to provide protection to plaintiff's husband in such collision—that it *permitted* the body of his automobile to collapse against him, when it was struck in the side by another automobile.

Plaintiff's amended complaint was dismissed by the district court for failure to state a claim upon which relief could be granted and such dismissal was affirmed by the court below.

The decision below is clearly correct and there is no reason for this Court to review it. Under Indiana law, as well as the law generally, an automobile manufacturer must make his product reasonably fit for the *purpose* for which it is made and used, and he is responsible for harm *caused* by his failure to do so. But an automobile is neither made nor used for the purpose of having it struck by other automobiles, and the manufacturer is under no duty to design it so that it can be used with reasonable safety for such purpose, even though he knows that such accidents sometimes happen. Thus, as a matter of law, an automobile manufacturer cannot be held liable for injuries or deaths in collisions which the design of his automobile does not *cause*, but merely *permits*, and plaintiff's amended complaint was properly dismissed.

ARGUMENT.

I. PLAINTIFF'S CLAIM IS ANOMALOUS.

The majority opinion below took particular note of the unusual nature of plaintiff's claim:

> "Plaintiff does not assert that defendant's design could have functioned to avoid the collision. Plaintiff contends that in a trial plaintiff would prove, by expert opinion and subsequently adopted improvements in design by defendant and others, that the solid steel side rails of a perimeter frame provide added protection against impacts on the body sides. Plaintiff argues that the defendant's 'X' frame permitted the side of the automobile to collapse against the decedent when his station wagon was struck broadside by another vehicle. Plaintiff does not assert that the 'X' frame caused the decedent's automobile to be driven into the path of the striking vehicle or prevented it from being driven out of that path. Nor does plaintiff contend that the decedent could not have been killed or injured in this same collision had the 1961 Chevrolet station wagon been designed with a perimeter frame." (Petition, Appendix A, pp. 37-38.)

Plaintiff's claim, therefore, clearly is not a "garden variety" products liability claim. Defendant is not charged with having set in motion any force which itself injured or killed plaintiff's husband, or which caused or contributed to the collision in which he was killed. Defendant's only alleged *fault* was in designing an automobile frame which, for all that is alleged in the complaint, functioned perfectly as an automobile frame, at the time of the accident, but which *permitted* plaintiff's husband to be killed in such accident.

Plaintiff does not bother to explain how something which

merely "permits" injury becomes *in law* the proximate cause of such injury, and why, if the "X" frame of this automobile was the proximate cause of the death of her husband, the exact same thing could not be said about every other part of the automobile, since they, likewise, did not prevent his death.

Thus, plaintiff would abolish, with one fell swoop, the fundamental tort principle that permitting something to is not causing it to happen, except in those instances where, by statute or by a voluntary undertaking, a *duty* is imposed upon the permitting party to exercise due care to prevent the happening. There are no facts alleged in plaintiff's complaint from which it could be inferred that defendant *undertook* to protect drivers of the 1961 Model Chevrolet from injury in side impact collisions. (See Petition, Appendix A, p. 40.)

If plaintiff's claim has merit, then automobile manufacturers may be held responsible for all injuries and deaths occurring to persons riding in or driving automobiles manufactured by them, regardless of the circumstances, since it is always true, when such injuries and deaths occur, a jury may find that the design of the automobile "permitted" such injuries to occur.

There is no doubt but that this is *precisely* plaintiff's position. At page 14 of her petition, she states:

> "The cause of all injuries and deaths was for years assumed to be the result of the negligent operation of the vehicle on the highway. Research has revealed that it is not the impact between the two vehicles and/or object that causes the injury and/or death, but it is the impact between the vehicle occupant and the vehicle interior or some other object which causes the damage. This is the so-called 'second accident'."[2]

2. Such "research" did not reveal this to be a *legal* theory of causation. It is nothing more than a suggestion of a member of the Illinois bar, Harold A. Katz, made in a comment published

And at page 31 of her petition plaintiff states without qualification that: "Suit here is for defendant's liability arising out of the 'second accident' and not the first."

So, although the claim here involves a side impact collision with another automobile and a complaint against only the design of the frame of defendant's automobile, if defendant can be held liable for the death of plaintiff's husband in this so-called "second accident", it can be held liable for failing to prevent all injuries in "second accidents", regardless of the nature of or responsibility for the first accident.

This is not, therefore, a claim for negligence, or for breach of implied warranty of fitness, or for strict liability in tort. It is a claim to establish legal liability without legal fault.

Plaintiff denies this. She says that "The restraining factor in this litigation may be found in plaintiff's theory of liability which seeks recovery because of the unreasonable risk created by defendant." (Petition, p. 15.) By this, plaintiff means that the manufacturer is only required to protect against a "*foreseeable* emergency." (See Petition, p. 4.) This is no restraining factor at all. It erroneously equates duty to what is foreseeable. By now, every automobile manufacturer knows that its automobiles can strike objects and be struck by objects of every conceivable kind at every square inch of the automobile—from top to bottom, front to back and side to side, from every conceivable angle and with every conceivable force. Such knowledge, according to plaintiff, creates liability when an automobile

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in the Harvard Law Review. See *Katz, Liability of Automobile Manufacturers for Unsafe Design of Passenger Cars*, 69 Harv. L. Rev. 863. Mr. Katz did not purport to find any legal precedent for his suggestion and admitted that its adoption would pose problems, but he nevertheless felt that it would furnish a "great incentive for improved design" of automobiles. *Id.* at 872-3.

occupant is "permitted" to be injured in any such collision.

II. THE DECISION BELOW.

In affirming the dismissal of plaintiff's complaint for failure to state a claim, the majority of the court below held, as a matter of law, that the duty which defendant owed to users of its automobiles did not require it to design an accident-proof or fool-proof automobile; that its duty was to design an automobile to be reasonably fit for the purpose for which it was made, without hidden defects which would make it dangerous to persons so using it; that the intended purpose of an automobile does not include its participation in collisions, despite the manufacturer's ability to foresee the possibility that such collisions may occur; and thus, that defendant's design duty did not require it to design an automobile which would be "more" safe in collisions, or to test its design from that standpoint, since the danger from a collision is obvious to all. Accordingly, the court held that defendant's duty did not require it to equip all its automobiles with side rail perimeter frames, even though defendant and other manufacturers may have used such frame in other automobiles and even though such frames, in the opinion of certain experts, were "safer" in a side impact collision. (Petition, Appendix A, 37-40.)

In a dissenting opinion, Judge Kiley agreed with the plaintiff. (Petition, Appendix A, pp. 40-45.)

III. PLAINTIFF'S "REASONS FOR GRANTING WRIT" ARE NON-EXISTENT.

Plaintiff's counsel is obviously well aware that this Court seldom concerns itself with diversity actions such as this involving nothing more than the application of state law by a tribunal deemed to be an expert in the matter. See

Steele v. *General Mills* (1947), 329 U. S. 433, 438-9. In a desperate effort to entice this Court into reviewing such a decision, he has proceeded to conjure up a so-called "question of great national significance," a so-called constitutional issue, a large number of so-called decisional conflicts, and a so-called abortion of the Federal Rules of Civil Procedure. None of these exist.

The so-called question of great national significance is nothing more than the insinuation that the nation's highway death toll will be greatly intensified if the decision below is left to stand. This insinuation is made by a vague reference to the number of people killed and injured each year in traffic accidents, and by a completely false statement that the court below decided "that an automobile manufacturer does not have to exercise ordinary care in the design and manufacture of an automobile." (Petition, pp. 13, 25.)

The court below, of course, decided no such thing. As already noted, that court recognized that an automobile manufacturer does have a duty to make its automobiles reasonably fit for their intended use, but held this duty did not include a duty to make an automobile reasonably safe to be struck by other automobiles in collisions. Thus, contrary to petitioner's assertion, the duty imposed upon manufacturers of automobiles has not been diminished in any way, and the highways are not about to be flooded with carelessly built automobiles. Such manufacturers, after the decision below, have precisely the same duty as they had before the decision was rendered.

The nation's highway toll is of course a matter of great national concern. The Congress is presently grappling with the problem. But the number of deaths involved in the use of automobiles canont create a duty under the common law for automobile manufacturers, where no duty exists,

any more than the number of deaths involved in use of guns can create a duty under the common law for gun manufacturers, where no duty exists. The Congress is also presently grappling with the gun problem. The solution to these problems is not to be found in this Court or in any other court.

The so-called constitutional issue raised by plaintiff is nothing more than an evasive argument. She asserts that she was deprived of her right to a jury trial. (Petition, pp. 16-18; 25.) Obviously she was not if her complaint was properly dismissed for failure to state a claim upon which relief could be granted.

The so-called decisional conflicts involve an astounding bit of legal reasoning. Taking a cue from this Court's statement in *Conley* v. *Gibson* (1957), 355 U. S. 41, 45-46 that:

> ". . . a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

plaintiff argues:

1. that under Indiana law the nature and extent of a defendant's duty presents a *fact* question for the jury, once it has been alleged that there was *some* relationship between the parties showing that defendant owed plaintiff *some* duty; and
2. that plaintiff would have offered evidence below from which a jury could have found that defendant had a duty to equip the 1961 Model Chevrolet with a perimeter frame.

Plaintiff then proceeds to present to this Court her so-called evidence of duty, consisting of magazine articles, Oldsmobile advertising materials, and excerpts from testi-

mony of defendant's representatives before legislative committees, all of which, according to plaintiff, establish that defendant has "admitted" that it had such duty, and that defendant had knowledge of the alleged defects of the "X" frame. (Petition, pp. 5-12; 16-22.)

This argument might have some semblance of validity if whether a duty exist is, as plaintiff claims, a fact question. But it clearly is *not*—not in Indiana or anywhere else. It is a pure law question. As stated by the Indiana Supreme Court in the very decision relied on by plaintiff:

> ". . . The duty to exercise care for the safety of another arises *as a matter of law* out of some relationship existing between the parties, and it is the province of the Court to determine whether *such* a relation is shown as gives rise to such duty. In determining whether the relationship shown gives rise to a duty to use care, the Court decides a pure question of law." *Union Traction Co.* v. *Berry* (1919), 188 Ind. 514, 520-1, 121 N. E. 655, 657. (Emphasis added.)

There is no support anywhere for plaintiff's assertion that the court determines, from the relationship alleged, whether there is "some" duty, and the jury then determines the "nature and extent" of that duty. It is entirely a question of law to be determined by the court from the allegations of the complaint. See *Kahn* v. *Chrysler Corporation* (D. C. S. D. Tex. 1963), 221 F. Supp. 677, 678) cited with approval by plaintiff at page 27 of her petition:

> "However, who is to determine if a duty exists? Is this a matter of law or a disputed question of fact itself. Certainly there is disagreement in the instant case over whether or not the defendant had a duty to so design his vehicle that an accident like that under consideration could not happen. The very essence of plaintiff's complaint is that the defendant owed to the plaintiff a duty to manufacture an automobile with which it was safe to collide. But this is not sufficient

> to constitute a disputed fact issue, for this is a question of law to be determined by the court. *Whether or not a legal duty exists* on a given state of facts so as to give rise to actionable negligence on breach thereof, *as well as the nature and extent of the duty*, if any, is always essentially *a question of law.*" (Emphasis added.)

Clearly, therefore, the ruling below that whether a duty exists presents a question of law for the court is entirely consistent with Indiana law and with this Court's holding in *Conley*. Obviously, if as a matter of law, there is no duty there can not possibly be any fact question for a jury.

It is also claimed that the decision below conflicts with certain Indiana decisions holding that issues of foreseeability, proximate cause, and contributory negligence, present questions of fact for the jury. (Petition, pp. 25-26.) This is merely another way of repeating the erroneous assertion that duty is a fact question. Such issues can not possibly arise until the question of defendant's duty has first been determined as a matter of law, which can only be done by the Court.

And a conflict is claimed between the decision below, in affirming the dismissal of the implied warranty and strict liability counts of plaintiff's complaint, and two other decisions in this Circuit (*Dagley* v. *Armstrong Tire & Rubber Co., et al.* (7 Cir. 1965), 344 F. 2d 245; *Greeno* v. *Clark Equipment Co.* (D. C. N. C. Ind. 1965), 237 F. Supp. 427) which held that actions for breach of implied warranty and for strict liability in tort could be maintained against manufacturers, under Indiana law. *Dagley* and *Greeno* did so hold, but they did *not* hold that all of such actions would present fact questions for the jury. Neither did the court below hold that no such actions could be maintained in Indiana, but only that plaintiff's counts failed to state a claim under such theories.

Finally, it is claimed that the decision below will set the Federal Rules of Civil Procedure back fifty years. By this plaintiff has reference to the statements in the lower court's opinion, already noted, that plaintiff's complaint does not allege that the frame of her husband's automobile caused or contributed in any way to the collision in which he was killed or that he would not have been killed anyway even had his automobile been equipped with a perimeter frame. She says that these things are either irrelevant or else the court below should have assumed such facts since the defendant filed no motion to require plaintiff to supply omitted facts. (Petition, pp. 30-31.) This silly argument answers itself.

The only other reason advanced by plaintiff for this Court to review the decision below is that it was incorrect on the merits. That reason too is non-existent, as shown below.

IV. THE DECISION BELOW IS CLEARLY CORRECT—ALL THREE COUNTS OF COMPLAINT ARE BASED ON A BREACH OF AN ALLEGED DUTY WHICH DEFENDANT, AS A MATTER OF LAW, DID NOT HAVE.

A. The Negligence Count.

The duty of a manufacturer under Indiana law is to make his product reasonably fit for its intended use, without hidden defects which would make it dangerous to persons so using it. *J. I. Case Co.* v. *Sandefur* (Ind. 1964), 197 N. E. 2d 519.

This duty is not unlimited. As noted by the Indiana Supreme Court in *Sandefur*:

> ". . . On the other hand, there must be reasonable freedom for the manufacturer. He is not an insurer against accident, and is not obligated to produce only accident-proof machines. The emphasis is on the duty

to avoid hidden defects or concealed dangers. *Campo* v. *Scofield* (1950), 301 N. Y. 468, 95 N. E. 802."

The citation of the *Campo* case by the Indiana Supreme Court is most significant. That decision holds, in no uncertain terms, that when the source of a danger is *obvious,* the manufacturer is not required to make his product "more" safe:

> "Just as the manufacturer is under no obligation, in order to guard against injury resulting from deterioration, to furnish a machine that will not wear out, so he is under no duty to guard against injury from a patent peril or from a source manifestly dangerous . . . In other words, the manufacturer is under no duty to render a machine or other article 'more' safe—as long as the danger to be avoided is obvious and patent to all." *Campo* v. *Scofield* (N. Y. 1950), 95 N. E. 2d 802, 804.

The Wisconsin Supreme Court, in *Yaun* v. *Allis-Chalmers Mfg. Co.* (Wis. 1948), 34 N. W. 2d 853, 858, made the same observation as to an automobile:

> "The fact that an automobile properly made may cause injury to its occupants if permitted to leave the highway while traveling at a high speed may in a general sense make it a dangerous instrument, *but that is not the kind of danger for which courts have held the manufacturer responsible.*" (Emphasis added.)

See also *Ein* v. *Goodyear Tire and Rubber Co.* (D. C. N. D. Ind. 1959), 173 F. Supp. 497, 498:

> "Generally, the law is that *only* if an automobile construction is defective is it considered inherently dangerous to human safety, thereby rendering a manufacturer liable to an owner or passenger for injuries caused by such defective construction. *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916 F. 696; *Walker* v. *General Motors Corp.*, D. C. La. 1953, 115 F. Supp. 267. *There is no liability on the manufacturer simply because an automobile may be-*

> *come an instrumentality by which an injury is inflicted.* In other words, the manufacturer is not an insurer. It follows naturally that he has no duty to warn that an automobile may become such an instrumentality." (Emphasis added.)

These observations are particularly pertinent here. The danger to plaintiff's husband was not from the frame of his automobile, but from the striking automobile. If anything was obvious to him when he bought this automobile, and each and every time he got in it, it was that people in automobiles get killed when hit broadside by another automobile. During the previous ten years, hardly a day has passed without this being forcefully brought home to everyone via observation, newspapers, radio and television. Even if it is assumed that plaintiff's husband did not inspect this automobile prior to buying it or prior to getting in it on the day he was killed to determine whether or not its frame had side rails, there is no suggestion here that there was anything about the appearance of the automobile —inside or out—that made it look one bit safer in which to be hit broadside than the thousands of other automobiles in which thousands of other people had been killed in side impact collisions.

It is significant that plaintiff's complaint, before finally amended, alleged that defendant

> "* * * negligently failed to warn drivers of 1961 Chevrolet Stationwagon automobiles, including Roy Evans, that said automobile did not have a side guard-rail type frame, perimeter type frame, or any other type of outer frame protection, and was weak in the middle and had no strong side protection to protect drivers when involved in side impact collisions." (Appendix to Def. Br. below, p. 5.)

This claim was dropped in the final version. (Appendix to Pl. Br. below, pp. 3-12,) Presumably, plaintiff recog-

nized the inconsistency of such a claim. If defendant had had the duty which is here sought to be imposed, it could have discharged it by warning plaintiff's husband that the frame of its automobile had no side rails, or that its automobile was not safe to engage in side impact collisions. But while such a warning could conceivably have told plaintiff's husband something about the frame of the automobile which he didn't know, it could not conceivably have told him anything he didn't already know about the danger of being hit broadside by another automobile. Such a warning would have served no purpose. Plaintiff's husband did not, or at least it is not so alleged, buy this automobile for the express purpose of engaging in a side-impact collision. Defendant did not, or at least it is not so alleged, make it or represent it to be fit for that purpose. (See Petition, Appendix A, p. 40.) And though it may *seem* otherwise, certainly the average motorist does not buy an automobile for the purpose of smashing it or having it smashed and no one needs to be warned that it is not a safe thing to do in any automobile, regardless of make, model or frame. *Ein* v. *Goodyear Tire and Rubber Co.* (D. C. N. D. Ind. 1959), 173 F. Supp. 497, 498.

A manufacturer is not required to design his product so that it will be safe to strike someone with, or safe to be in or around when an outside force strikes.

In *Poore* v. *Edgar Bros. Co.* (Calif. 1939), 90 P. 2d 808, it was claimed that the glass installed by defendant in a used automobile sold to plaintiff was not fit for its intended purpose because it broke in a collision, cutting the plaintiff. The trial court dismissed the complaint and the appellate court affirmed, stating:

> "The liability of a manufacturer or vendor under the rules here relied upon is for such negligence, in the construction of an article, as renders the same inherently dangerous if used for the purpose for which

it was intended. *These rules have no application where an article is not inherently dangerous for its intended use, and where it becomes dangerous only when something else intervenes.* While defective wheels or brakes on an automobile make it inherently or imminently dangerous, danger being a probable rather than merely a possible result of its use, the same may not be said of the use of ordinary glass instead of safety glass in its windows. *Automobiles are intended to run upon the highways and to be kept under control, but the glass in their windows is not intended to withstand blows as a part of its ordinary use.* While such windows may be broken, and frequently are, this is due to intervening causes and not to the fact that they are inherently dangerous for the purpose for which they were intended. Cars ran for years with ordinary glass in the windows and the new statutes requiring safety glass were adopted not because other glass was inherently dangerous in the intended use of a car but because of the greater likelihood of intervening causes of danger, due largely to the increased number of cars on the road. *The resulting danger is one arising from outside sources rather than from any inherent danger in the article itself.*'' 90 P. 2d at 809-10. (Emphasis added.)

In *Tamburello* v. *Travelers Indemnity Co.* (D. C. E. D. La. 1962), 206 F. Supp. 920, the infant plaintiff was riding in a baby seat in an automobile driven by its mother. The baby seat became dislodged from the car seat when the mother ran the automobile into a tree. The suit was against the insurer of the manufacturer of the baby seat claiming breach of warranty and negligence for manufacturing and selling a seat which failed to remain fixed to the automobile seat during the collision. The court granted summary judgment for the insurer, stating:

> ''It is not the intention of the court to minimize the seriousness of the child's injuries. . . . But unfortunate though the situation may be, plaintiff's claim against the insurer of the manufacturer of the baby car seat

it not a reasonable one, and must be disposed of by summary judgment.

"... No allegations have been made and no evidence could be offered under the undisputed circumstances here to support plaintiff's theory. There is no controverted question of fact which would preclude a summary judgment in these proceedings. *No cause of action has been established by plaintiff, and no actionable negligence or breach of warranty has been shown against defendant's insured which would allow recovery.* The label attached to the baby seat, 'On the road absolute safety' upon which plaintiff avers he relied in purchasing this item (at a cost of approximately $5.00) was obviously not intended to be a guarantee that the car seat would remain intact under any and all circumstances and particularly in a collision of such force as plaintiff's wife was involved in here. *All that the warranty amounts to is that during the normal operation of an automobile, a child seated in the car seat would remain seated. But this does not mean that plaintiff and his wife, relying on the warranty, can relax the necessary vigilance and caution for the safe operation of their automobile.*" 206 F. Supp. at 922. (Emphasis added.)

In *Hatch* v. *Ford Motor Company* (Calif. 1958), 329 P. 2d 605, a child walked into a pointed hood ornament on an automobile and lost an eye. The trial court sustained a demurrer to the complaint and this was affirmed on appeal, the court stating:

"If we were to hold that there was a duty to render a vehicle safe to collide *rather than simply a duty to so manufacture it as to make it safe for the use for which it is intended, i.e., to move upon the highways or to be safely parked,* that duty would apply not only to ornaments such as that in question here but to functional parts of the vehicle. If, in the present case, the minor plaintiff had stumbled as he approached the vehicle and struck his face against a headlight lens causing it to fracture and lacerate his eye, the question of duty to make the vehicle safe to collide with

would be clearly presented under a claim that if the headlight lens had been made of safety glass the plaintiff would not have lost his eye; or, if the plaintiff had collided with the side of the car and his eye been impaled upon a radio antenna which had been telescoped so that its point protruded but a few inches above the body of the car, again the claim might be made that this created a danger which might have been avoided by enclosing the antenna within the body of the car so as not to protrude therefrom. *In other words, each case in which a person collided with a standing vehicle and received some injury from a part of a vehicle which injury he might not have sustained had the vehicle been constructed in some other manner would raise a question of fact as to whether the manufacturer was liable to that person. In effect the triers of the facts would be the arbiters of the design of automobiles and the standard of design would be determined not when the automobile was manufactured but after the occurrence of an accident.*" 329 P. 2d at 607-8. (Emphasis added.)

These cases conclusively demonstrate that as a matter of law an automobile is not made or used for the purpose of striking or being struck by other vehicles or objects and that the duty of an automobile manufacturer does not include the duty to design an automobile from the standpoint of how it may be misused or bludgeoned by outside forces. Merely because a product can be used dangerously or because a user while using it can be subjected to danger, not from the product but from something else, does not mean that the product is manufactured for such purpose, nor is the manufacturer required to protect the user from such danger.

Unless convertibles are to be outlawed (no protection whatever from "top impacts"), unless the use of glass in automobiles is to be outlawed (no protection from anything except the weather), unless compact models are to be outlawed (necessarily less protective than more expensive

models), it must be the law that a manufacturer of an automobile is free to build an automobile with a frame or without a frame with sides or without sides with a top or without a top, so long as it is reasonably fit for its intended use as a means of transportation. Obviously, it cannot have hidden defects which would make it dangerous when so used. But just as obviously, it does not have to qualify as a safe place to be when a tornado strikes.

The principal authority cited for plaintiff's claim, both by the plaintiff in her petition (pp. 23-24) and by the dissenting judge below (Petition, Appendix A, p. 43), is the Restatement of the Law of Torts, Second, §§ 395 and 398. These sections read as follows:

> "§ 395. A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should expect to be endangered by its probable use, is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied."
>
> "§ 398. A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design."

There is absolutely nothing in these sections or in the many comments concerning them which suggests that a manufacturer may be held liable for any so-called second accident between his product and a user when his product was in no way responsible for the first accident. In order to find such liability for this defendant in these sections,

plaintiff and the dissenting judge below must re-write them drastically.

They must say that "caused" does not mean caused in the legal sense but means "permitted to happen."

They must say that the phrase "for a purpose for which the manufacturer should expect it to be used" means that an automobile manufacturer should expect that his automobile will be used *for the purpose of* having it struck by another automobile.

And they must say that the automobile manufacturer under these sections is not only required to protect the user from harm from an outside force but that he is also required to protect the automobile itself from such harm, since Comment (n) to § 395 clearly states that "the rule stated in this Section applies where *the only harm* which result from the manufacturer's failure to exercise reasonable care *is to the manufactured chattel itself.*" (Emphasis added.)

Moreover, since these two sections of the Restatement do not apply to automobile manufacturers *only,* but re-state the common law application to *all* manufacturers of *all* chattels, plaintiff and the dissenting judge below must say that such sections would require the manufacturer of an umbrella, for example, to make it so as to provide reasonable protection to a user and to the umbrella itself from harm from a falling tree. All of the elements of such theory of liability would be present in such an occurrence. The umbrella would have been used in a rain storm. The collision between the tree and the umbrella would have been foreseeable. Harm would have been permitted to happen to the user and to the umbrella. And the manufacturer of the umbrella should have expected that it would be used for the purpose of having it struck by a falling tree.

If the Restatement is to be construed as imposing such

liability upon an automobile manufacturer, but not an umbrella manufacturer, on what basis is the distinction to be made? It is no answer that people can see that an umbrella is no real protection from a falling tree. People can also see that automobiles are no real protection from striking automobiles. The lesson is repeated every day of the year. It is simply ignored.

Neither is it any answer that the umbrella manufacturer cannot be expected to provide such protection in the case of an umbrella, whereas the automobile manufacturer can be expected to provide such protection in the case of an automobile. These are only current opinions shared by some, but not necessarily all people. Who knows what opinions would prevail about what umbrella manufacturers could do after research (of the second accident type) into the tree-umbrella collision under the pressure of 45,000 deaths a year from that type of collision? Plaintiff herself admits in her petition (p. 14) that the notion that automobile manufacturers can do something about the second accident is of recent origin.

The point is, the common law, unlike legislation, does not impose duties on the basis of current opinions about particular manufacturers which may be conflicting and which are subject to momentary change, and the Restatement cannot be so construed.

Neither the plaintiff nor the dissenting judge below has cited a single decision which holds or even suggests that the automobile manufacturer must not only make a product reasonably fit for its intended use, but must also furnish reasonable protection against harm solely caused by outside forces being brought to bear upon the automobile through no fault of the manufacturer.

The dissenting judge, in his opinion, believed that two cases might be placed in this category—*Carpini* v. *Pitts-*

burgh and Weirton Bus Co. (3 Cir. 1954), 216 F. 2d 404, and *Ford Motor Co.* v. *Zahn* (8 Cir. 1959), 265 F. 2d 729—neither of which is relied on or even cited by plaintiff in her petition.

Both of these cases are clearly distinguishable on their facts. In *Carpini,* the claimed defect in the design of the braking system of a bus (a petcock used to drain the air chamber of the system was located too close to the ground and was broken off by debris in the street, resulting in a failure of the brakes) was a *direct cause* of the collision and the injuries suffered by the passengers of the bus. In *Zahn,* an ash tray with a protruding jagged edge, which the manufacturer conceded should have been discovered by its inspectors and remedied, was a *direct cause* of the plaintiff's eye being put out when the brakes of the automobile were suddenly applied and he was thrown against the defective ash tray. Neither of these cases involved a mere failure to furnish protection from injuries inflicted solely by an independent outside force.

Plaintiff, in her petition, cites a host of decisions, without disclosing their facts. None of them involved an outside force.

MacPherson v. *Buick Motor Co.* (N. Y. 1916), 111 N. E. 1050 (Petition, pp. 23, 24, 32), which plaintiff admits states the products liability law of every state except Mississippi (Petition, p. 32), involved a defective automobile wheel which collapsed under the automobile.

Elliott v. *General Motors Corp.* (7 Cir. 1961), 296 F. 2d 125 (Petition, p. 23), involved a sharp edged splash shield, hidden from view, but placed where a mechanic would have to put his hands to repair the automobile.

Coca-Cola Bottling Works of Evansville v. *Williams* (Ind. App. 1941), 37 N. E. 2d 702 (Petition, p. 23), involved

foreign matter (a piece of concrete) in a bottle of Coca-Cola, which plaintiff drank.

Holland Furnace Co. v. *Nauracaj* (Ind. App. 1938), 14 N. E. 2d 339 (Petition, p. 23) involved a furnace installed on a wooden instead of a non-combustible platform which caught fire from the heat of the furnace and burned the house.

Dagley v. *Armstrong Rubber Company* (7 Cir. 1965), 344 F. 2d 245 (Petition, pp. 24, 28), and *Halpern* v. *J. A. D. Construction Co.* (N. Y. Sp. Ct. 1960), 202 N. Y. S. 2d 945 (Petition, p. 27), both involved an automobile tire, claimed to have been defectively designed and to have blown-out causing a collision.

Meyer v. *Greenwood, et al.* (Ind. App. 1955), 124 N. E. 2d 870 (Petition, p. 25), involved pork infested with trichinae with plaintiff bought and ate, becoming ill. An Indiana statute prohibited the sale of adulterated food, the violation of which constituted negligence *per se.*

Robertson Music House v. *Wm. H. Armstrong Co.* (Ind. App. 1929), 163 N. E. 839, and *Hamilton, Executor,* v. *Feary* (Ind. App. 1893), 35 N. E. 48, are cited by plaintiff for the proposition that under Indiana law, even where defendant owes no duty to protect plaintiff, if he nevertheless undertakes to protect the plaintiff, he is liable for damages sustained on account of his failure to exercise reasonable care in the pursuit of such undertaking. This is sound Indiana law, but it has no application here. The complaint does not allege that defendant "undertook to provide additional protection against impact on the body sides" of the 1961 Chevrolet. The theory of plaintiff's complaint is that defendant was negligent in failing to undertake to provide such protection.

Plaintiff also quotes, out of context, from three opinions, again without discussion of any facts. Thus, she quotes

(Petition, p. 26) the following language from the opinion in *Davlin* v. *Henry Ford & Son, Inc.* (6 Cir. 1927), 20 F. 2d 317, 319:

> "Its duty . . . to use reasonable care in employing designs . . . which would fairly meet any emergency of use which could reasonably be anticipated."

But she does not disclose that *Davlin* involved the seat of a tractor which broke causing the user to fall and be run over by the tractor, and that in this case *a directed verdict for defendant manufacturer was affirmed* because plaintiff failed to prove how the tractor was being used at the time of the accident, the court stating:

> ". . . the burden was on the plaintiff to show . . . reasonable use. Before plaintiff was entitled to a submission of the case to the jury, the nature of the use to which the machinery was subjected and the cause of the fracture of the cap screw should have been reasonably indicated in the testimony." 20 F. 2d at 319.

She also quotes (Petition, p. 27) the following statement from the opinion in *Kahn* v. *Chrysler Corporation* (D. C. S. D. Tex. 1963), 221 F. Supp. 677, 679:

> "The duty of the automobile manufacturer extends to the ordinary use of the vehicle, and may even be such as to cover certain situations when the automobile is being negligently used."

But she does not disclose that in *Kahn* the suit was on behalf of a minor who drove his bicycle into the rear of an automobile, striking his temple against a sharp and protruding fin on the rear of the vehicle, and that the court *granted summary judgment for defendant* stating that, as a matter of law, automobile manufacturers—

> ". . . should not be required to anticipate all the possible ways in which a person may injure himself by falling against an automobile, nor should they have a duty to protect against such possible injuries."

And, finally, plaintiff quotes (Petition, p. 27), the following statement from the opinion in *Hardman* v. *Helene Curtis Industries, Inc.* (Ill. App. 1964), 198 N. E. 2d 681, 691:

> ". . . the question of ordinary use is as much a question of fact as is the question of what is a foreseeable use."

But she does not disclose that the product involved in *Hardman* was a hair spray which the plaintiff, a six year old child, had used in large amounts on her hair and dress which later ignited while the child was carrying a lighted candle, and that there was no warning on the can that the hair spray was flammable. The duty imposed upon the manufacturer in *Hardman* was not to make a hair spray which would furnish a user reasonable protection from fire, or even to make a non-inflammable hair spray, but simply a duty to warn users about dangers inherent in a use of the product which were not readily apparent.

There is, therefore, but one possible conclusion from *all* the authorities—that *as a matter of law* defendant's duty to plaintiff's husband did not include a duty to design the 1961 Model Chevrolet so as to protect him from injury or death in the collision in which he was killed.

The situation is not changed one whit by the fact that Ford had put a frame with side rails in some (but not all) of its automobiles and had ambiguously claimed that such frame was stronger than the "X" frame (Petition, p. 7), nor by the fact that defendant itself was building Oldsmobiles with frames having side rails and had itself noted that such frames furnished protection from impacts on the side. (Petition, p. 9.) And the same is true notwithstanding all the so-called "admission" of duty and "recognitions" of defect by defendant which plaintiff believes is shown by the extraneous materials which she would have offered as

evidence at the trial. (Petition, pp. 8-12; 20-22.) These are the only "authorities" upon which plaintiff replies, but they are not legal authorities in any sense of the word.

A manufacturer's duty is created by *law,* not by any or all of the things relied on by plaintiff. If it were the law that defendant owed plaintiff's husband a duty to protect him from the forces which killed him, then some of the things upon which plaintiff relies might properly be considered—at trial—in determining whether defendant had fulfilled or breached said duty. But those things separately or together, cannot create a duty if none exists in law.

In *Ein* v. *Goodyear Tire and Rubber Co.* (D. C. N. D. Ind. 1959), 173 F. Supp. 497, a tire manufacturer was claimed to have been negligent in making tires of different qualities and in failing to warn the public of those differences. In holding the claim deficient as a matter of law, the court stated:

> "What plaintiffs seem to claim is that since they allege a tubeless tire is more susceptible to blowouts following a bruise than are tires with tubes, and since it is also alleged that defendant was more aware of this fact than the public generally, it was defendant's duty to warn buyers and others about this feature of tubeless tires . . .
>
> "While there may be a difference in the wearing qualities between two types of tires, such as claimed in this case, a manufacturer has no duty, in my opinion, to call the difference to the attention of the buyer or the public generally. In other words, the manufacturer need not anticipate or foresee that his customers will erroneously assume that the two types of tires are of the same quality. It must be concluded that liability cannot be predicated upon plaintiff's theory of negligence." 173 F. Supp. at 498.

See also, *Wigmore on Evidence* (3d Ed.) § 461:

> "* * * *the substantive law* tells them (the jury) what

> the *standard of conduct for negligence is;* and this standard is a fixed one, independent of the actual conduct of others. To take that conduct as furnishing a sufficient legal standard of negligence would be to abandon the standard set by the substantive law and would be improper." (Emphasis added.)

And *Johnson* v. *Murray Co.* (Tex. 1936), 90 S. W. 2d 920, 926:

> "However, negligence for use of a dangerous plan or design cannot be predicated alone upon the fact that other manufacturers of the same kind of machinery constructed or made it differently."

Plaintiff and the dissenting judge below obviously believe that automobile collisions have become so common that automobile manufacturers should be placed in a category apart from other manufacturers. But if this is to be done, it must be done by the legislature, not the judiciary by rewriting the common law. As noted in the majority opinion below:

> "Perhaps it would be desirable to require manufacturers to construct automobiles in which it would be safe to collide, but that would be a legislative function, not an aspect of judicial interpretation of *existing* law." (Petition, Appendix A, p. 38.) (Emphasis added.)

If manufacturers of automobiles are to be made liable for failing to prevent injury from collisions, regardless of their cause, the legislature must make them insurers. If it is to be something less than this ("safer" cars), the legislature must fix the standards (as, for example, the recent seat belt statutes). Courts and juries are not equipped to fix such standards in each case on the basis of what may or may not, by use of hindsight, have appeared to have been "safer". Here, it is claimed that reasonable care requires an automobile to be equipped with a side frame,

evidently because plaintiff believes (but has not alleged) that the automobile which struck the station wagon driven by her husband would have struck such a frame and the violence of the impacting force might have been lessened and therefore her husband would not have been killed but only injured. Next, when an automobile with such a frame is struck *too hard,* or *above such frame,* the claim will be that the frame should have been thicker or taller, until eventually only Sherman tanks can be built. Then the charge might very well be that such an impenetrable construction absorbs none of the energy in an impact and the occupants are much less safe. See *Hatch* v. *Ford Motor Company* (Calif. 1958), 329 P. 2d 605, 607-8.

The point is, "safer" is no standard at all. The instant complaint is a perfect example of this. Plaintiff does not say that a side frame in the station wagon would have probably or even possibly *prevented* her husband's death, or that the side frames in the other automobiles allegedly using them to any great or even small extent *prevent* drivers from being killed. The *only* claim is that such a frame would have "*afforded added protection* from injury and/or death." How much protection, and whether it would have been enough in this collision, is left to speculation.

If courts are to impose upon automobile manufacturers the duty as claimed by plaintiff, how are juries to be instructed? What is the duty? To provide safe cars? An insurer's duty? If not, if only reasonable protection, under what circumstances does the duty arise? When a competitor *claims* to have made a safer car? Or when someone *criticizes* a manufacturer's product as not being as safe as another? And how could juries be prevented from imposing an insurer's liability, or from basing a verdict on pure speculation and hindsight or from applying their own notions as to how an automobile should be built with the knowledge that some day they may be involved in a col-

lision and would like to be protected in this fashion or that fashion?

These are not mere abstract questions. They are part and parcel of plaintiff's unusual claim and they are unanswerable except by appropriate legislation. Moreover, they demonstrate that plaintiff's plea, at pages 32-33 of her petition, that the history of the common law is one of growth, and that

> "The goal of safe cars of the unreasonableness of the design of the instant automobile cannot be left *solely* to legislative action. Courts have a responsibility *to protect consumers under existing laws* and to *interpret* Indiana law." (Emphasis added)

is nothing more than an invitation to this Court to consider whether it should attempt to legislate safe automobiles into existence under the guise of "permitting" the common law to "grow", starting with the common law of Indiana.

What has been said herein as to defendant's alleged design duty applies with equal force to its alleged duty to test its designs. If defendant had a duty to protect drivers of its automobiles from injury in side impact collision, then of course it had a duty to test the design of its automobiles from that standpoint, including one would suppose, from the standpoint of 75 m.p.h. impacts.

But if defendant had no duty to protect drivers from injury in side impact collisions, as heretofore shown, then it had no duty to test the design of its automobiles from that standpoint. There is no duty on a manufacturer to test merely for the purpose of seeing what happens. His duty to test is coextensive with, not broader than, his duty to furnish a product reasonably fit for its intended purpose.

B. The Implied Warranty and Strict Liability Counts.

There are no Indiana decisions by which to measure the legal sufficiency of the implied warranty and strict liability counts of plaintiff's amended complaint. As yet no Indiana appellate court has been asked to decide whether a manufacturer may be sued for breach of implied warranty by one not in privity of contract with such manufacturer, or whether Indiana will adopt or reject the strict liability doctrine as set forth in § 402A of the Restatement of the Law of Torts, Second.

Nevertheless, it is perfectly obvious that if the negligence count of plaintiff's complaint was properly dismissed, then the implied warranty and strict liability counts were also properly dismissed for precisely the same reason—no duty on which to base a claim of breach of implied warranty or a claim of a dangerously defective condition.

If defendant, as a matter of law, was not required to design its automobiles so as to protect drivers from injury in side impact collisions, then it necessarily follows that defendant, as a matter of law, did not impliedly warrant that its automobiles would protect drivers in such collisions, and that the automobile here in question, as a matter of law, was not dangerously defective merely because it was not designed with side rails which might conceivably have furnished plaintiff's husband with "added" protection in the side impact collision in which he was involved.

As noted by the court in *Henningsen* v. *Blomfield Motors, Inc.* (N. J. 1960), 161 A. 2d 69, 76, implied warranty "simply means that the thing sold is reasonably fit *for the general purpose for which it is manufactured and sold.*" (Emphasis added.) Thus implied warranty, like negligence, requires *duty*—the *same* duty.

The same is true with respect to strict liability. Section 402A of the Restatement of the Law of Torts, Second provides:

> "§402A. Special Liability of Seller of Product for Physical Harm to User or Consumer.
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) The user or consumer has not bought the product from or entered into any contractual relation with seller.

but Comment (h) to such section of the Restatement plainly states that:

> "A product is not in a defective condition when it is safe for normal handling."

and Comment (i) states that before a manufacturer can be liable under § 402A "the article sold must be dangerous to an extent *beyond* that which would be contemplated by ordinary users who purchase it with the ordinary knowledge common of the community as to its characteristics." (Emphasis added.)

Plaintiff makes no claim in her petition that her implied warranty and strict liability counts stand on any different footing than her negligence counts.

Her only arguments are (1) that she has found no

Indiana decision which would deny recovery to her under such theories (obviously, since there are no Indiana decisions either way), and (2) that the decision of the court below in affirming the dismissal of such counts is contrary to other decisions in the same circuit, an argument already shown herein (*supra,* p. 12) to be completely without merit.

CONCLUSION.

The court below correctly applied applicable state law to the complaint before it. Plaintiff's claim that an automobile manufacturer may be held responsible for injuries and deaths which its automobiles merely *permit* to happen to users is completely beyond the pale of the manufacturer's duty under Indiana law.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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